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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ADDISON ALBERT LINER,

Defendant and Appellant.

B201373

(Los Angeles County  
Super. Ct. No. BA 317869)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
William C. Ryan, Judge. Affirmed in part, reversed in part and remanded with  
directions.

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Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec  
and Ellen Birnbaum Kehr, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Addison Liner appeals from the judgment following his conviction for possession of cocaine base. We affirm the conviction, vacate the prison sentence and remand the cause for resentencing.

### **FACTS AND PROCEEDINGS BELOW**

Detective James Mylonakis testified as follows.

At approximately 3:30 p.m. Mylonakis was driving an unmarked car in the vicinity of 75th and Hoover when he saw a woman approach Liner's car and saw Liner and the woman exchange something hand-to-hand. Believing he had witnessed a drug deal, Mylonakis followed Liner until he stopped in the parking lot of a fast food restaurant. Mylonakis pulled into the lot and stopped near Liner. When Mylonakis approached Liner's car he smelled marijuana and saw a blunt in the ashtray. He arrested Liner, patted him down and cuffed his hands behind his back. He then placed Liner in the front seat of the unmarked car.

Mylonakis drove Liner to his house in the 7400 block of Hoover after obtaining Liner's consent to conduct a search. On the way Mylonakis contacted other officers to go to the house to make sure no one went in or came out.

When Mylonakis and Liner arrived at Liner's house Mylonakis went to the passenger side of the car to assist Liner to get out. He noticed the fly on Liner's pants was unzipped. While Mylonakis helped Liner out of the car he was watching Liner's pants legs. As Liner stepped out of the car Mylonakis saw an off-white solid item fall from the inside of one of Liner's pants legs and land on the ground by his foot. Liner stepped on the item and tried to grind it into the cement. Mylonakis walked Liner away from the item and called it to the attention of another officer who recovered it. A laboratory test showed the item was rock cocaine weighing 0.35 grams. Asked why he did not find the cocaine when he searched Liner, Mylonakis answered that it is common in street sales for a male to hide narcotics under his testicles or inside his rectal cavity. For that reason, and because Liner's fly was open, Mylonakis concluded Liner had possibly hidden narcotics on his body and was watching to see if something fell out.

After calling on other officers to collect the item that fell out of Liner's pants, Mylonakis entered Liner's house. In the only bedroom, Mylonakis found a ceramic plate containing 0.77 grams of cocaine. The closet contained only men's clothing in what appeared to be Liner's size. Mylonakis also found utility bills in Liner's name. (Liner was not prosecuted for the drugs found in the house.)

While Mylonakis was carrying out his investigation of Liner's drug possession other officers staked out near Liner's residence observed a drug transaction take place in the driveway next to the residence. One of the persons arrested in that transaction was also charged with possession of cocaine base and tried with Liner.

Liner testified that Mylonakis followed him from his house to the parking lot at 54th and Vermont where he was arrested and driven back to his home. The hand-to-hand exchange that Mylonakis thought was a drug transaction was, according to Liner, his giving the key to his house to a friend so that she could go in and take a shower. Liner further testified that Mylonakis lied when he said that the cocaine the police found on the ground fell out of his pants.

A jury convicted Liner of one count of possession of cocaine base. The trial court sentenced him to the midterm of two years doubled under the "Three Strikes" law. Liner filed a timely appeal.

## **DISCUSSION**

### **I. EVIDENCE OF THE HAND-TO-HAND TRANSACTION BETWEEN LINER AND A WOMAN**

During cross-examination of Mylonakis, codefendant's counsel asked the officer whether he saw "what appeared to be a drug transaction between [Liner] and a female[.]" Mylonakis responded that he had seen such a transaction.

Prior to Liner's cross-examination, the parties and the court discussed whether the prosecutor could question Liner about the hand-to-hand transaction that Mylonakis testified he saw take place between Liner and a woman. The prosecutor argued that getting Liner to admit that such a transaction took place would impeach Liner's credibility. Liner had testified on direct examination that Mylonakis began following

him when he left his house. Mylonakis testified, without objection, that he began following Liner after he observed the hand-to-hand transaction “on 75th Street and Hoover.” Liner’s counsel argued that evidence of the transaction would not impeach Liner’s testimony because he was not charged with selling cocaine, only possessing it. The prosecutor responded that the purpose of the questioning was not to impeach Liner regarding sales of narcotics. The purpose was to impeach his credibility by showing his testimony that Mylonakis began following him from his house was contradicted by Mylonakis’ testimony he began following him after he observed what appeared to be a drug deal at 75th and Hoover. The court ruled the prosecutor could ask Liner about the transaction.

Based on the court’s ruling the prosecutor asked Liner: “Now Mr. Liner, isn’t it also, in fact, true that before Detective Mylonakis approached you, there was a female black who approached your car and engaged in a hand-to-hand transaction?” to which Liner answered, “Yes, ma’am.” Liner explained that the hand-to-hand transaction consisted of him giving his house key to a friend so that she could go inside and take a shower.

Liner argues the court erred in allowing the prosecutor to ask him about the transaction with the woman because it was not proper impeachment and it prejudiced the jury by suggesting that he was a drug dealer notwithstanding that he was only charged with drug possession.

We need not decide whether the court erred because the error, if any, was harmless.

Whether Mylonakis began following Liner from his house in the 7400 block of Hoover or began following him starting a block away at 75th and Hoover was too slight a discrepancy to have affected Liner’s credibility. The damage to Liner’s credibility resulted from the evidence of the hand-to-hand transaction between him and a woman which Mylonakis, an experienced drug enforcement officer, interpreted as a possible drug sale. But evidence of that transaction had *already* been introduced through the testimony of Mylonakis without any objection by Liner. Raising the transaction again on cross-

examination may have actually benefited Liner because it gave him an opportunity to offer an innocent explanation of what changed hands between him and the woman; keys not drugs.

Furthermore, strong evidence tied Liner to the cocaine found on the sidewalk. Mylonakis' testimony that he saw the cocaine drop from inside Liner's pants was supported by his testimony that Liner's fly was open and that males often secrete drugs beneath their testicles or in their rectal cavities. Liner's attempt to destroy the cocaine by grinding it into the cement with his foot supported a guilty conscience. Finally, 0.77 grams of cocaine were found in Liner's bedroom following his arrest.

## **II. EVIDENCE OF LINER'S GANG MEMBERSHIP**

Liner next contends that the court erred in allowing Mylonakis to testify that Liner is or was a gang member. The colloquy between codefendant's counsel and Mylonakis went as follows:

"Q. Is Mr. Liner a gang member?

"A. According to gang officers, he is.

"Q. Okay. And he's active?

"A. He's what they refer to as O. G.

"...

"Q. Did you arrest any gang members that day?

"A. Well, Mr. Liner."

After that last question and answer, counsel for Liner objected and moved to strike the gang testimony for lack of foundation. The trial court overruled the objection. Mylonakis proceeded to testify that he personally did not know whether Liner was a gang member and that his only knowledge was what he had heard from "our gang officers."

Liner argues that admission of evidence of his current or former gang membership requires reversal of his conviction because the evidence was irrelevant, lacking foundation and highly prejudicial.

Admission of the gang evidence does not require reversal in this case because even assuming it was irrelevant and lacked foundation it was not “highly prejudicial.” The dangers in introducing evidence of gang membership are that the jury will improperly infer that because the defendant is a gang member he has a criminal disposition (*People v. Cardenas* (1982) 31 Cal.3d 897, 905) and that regardless of his guilt of the charge against him the jury will want to punish the defendant for his gang membership because of the jury’s distaste for the violent and vicious behavior associated with gangs. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 228.) These dangers were of little moment in the present case. Liner was approximately 54 years of age at the time of trial, he had suffered a stroke that paralyzed his left side, he had an unspecified injury to one of his arms, he lived on Social Security disability payments and suffered from high blood pressure and took four kinds of medication. Given that evidence and Mylonakis’ admitted lack of knowledge of Liner’s gang association, it is not reasonably probable that the jury would conclude that Liner was an active gang member with criminal propensities and a menace to society.

In addition, as we explained above, there was strong evidence of Liner’s guilt so that we cannot say it is reasonably probable that he would have obtained a more favorable result absent the admission of the gang evidence. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

### **III. PROSECUTORIAL MISCONDUCT**

Liner contends that the prosecutor committed misconduct in closing argument by vouching for the credibility of the police officers and stating that Liner had \$216 in his pocket when he was arrested—a fact not in evidence. Although these contentions were forfeited by Liner’s failure to object and request a curative admonition (*People v. Frye* (1998) 18 Cal.4th 894, 969), we nonetheless address them.

During closing argument, the prosecutor stated, referring to the police officer witnesses, “They’re not going to jeopardize their career, their livelihood . . . to come and fabricate something . . . and the fabrication is .70 grams of cocaine.” This did not

constitute a personal vouching for the truthfulness of the officers. The prosecutor was merely arguing that the officers had a motive not to fabricate evidence against the defendants. Because a witness's credibility is always an issue, attorneys routinely argue to the jury reasons why a witness has or does not have a motive to lie.

We agree the prosecutor committed misconduct in mentioning that at the time of his arrest Liner had \$216 in his pocket but the error was not prejudicial given the strong evidence of his guilt of the possession charge.

#### **IV. THE INSTRUCTION ON REASONABLE DOUBT**

Liner maintains the reasonable doubt instruction contained in CALCRIM No. 220, which instructs the jury to “compare and consider” the evidence it has received, denies him due process by imposing a burden on him to prove his innocence. Our colleagues in Division Two rejected this argument in *People v. Campos* (2007) 156 Cal.App.4th 1228, 1237-1238. We concur in their reasoning.

#### **V. THE INSTRUCTION ON HIDING EVIDENCE**

Liner argues the instruction on hiding evidence contained in CALCRIM No. 371 was intended to apply only to attempts to conceal evidence in anticipation of, or during, judicial proceedings. Liner forfeited this argument because he did not object when the court listed the instructions it intended to give, including CALCRIM No. 371, and asked both sides if they had any objections to those instructions. (*People v. Valdez* (2004) 32 Cal.4th 73, 137.) In any case, the instruction was proper. Efforts to destroy physical evidence before judicial proceedings have begun have been held to support the giving of CALJIC No. 2.06, the predecessor of CALCRIM No. 371. (*People v. Wilson* (2005) 36 Cal.4th 309, 330; *People v. Coffman* (2004) 34 Cal.4th 1, 102-103.)

#### **VI. PROOF OF PRIOR CONVICTIONS FOR SERIOUS OR VIOLENT FELONIES**

Finally, Liner maintains that his sentence under the Three Strikes law must be reversed because it was predicated on his having suffered a prior conviction for rape, a “serious felony,” but the prosecution failed to prove that conviction. The record supports

Liner's contention. It shows that Liner admitted on cross-examination that he had "four other felony convictions" in addition to a 2006 conviction for possession of cocaine base for sale. But, as the People concede, Liner's admission that he had four "felony convictions" did not amount to proof beyond a reasonable doubt that he had a conviction for the "serious felony" of rape. Accordingly, Liner's sentence must be vacated and the cause remanded to the trial court for resentencing. (*People v. Monge* (1997) 16 Cal.4th 826, 845.)

### **DISPOSITION**

The four-year prison sentence is vacated and the cause is remanded to the trial court for resentencing in accordance with law. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

DUNNING, J.\*

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\* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.